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Minutes of the IAG Employee Relations Committee
October 19, 1979

Wilma Lehman, Acting Chief, Employee Relations Branch, Workforce Effectiveness and Development Group, chaired the meeting, assisted by Richard Mihelcic of the Internal Revenue Service, several members of the committee, and Cynthia Field of the Employee Relations Branch.

Discussion of recent appellate decisions and issues

Mrs. Field gave a tally of the Part 752 appeals accepted and decided by MSPB under the new procedures thus far: 463 decisions, of which 393 or 85%, sustained the agency's action; 23, or 5%, reversed the agency action because of harmful procedural error; and 47 or 10%, reversed the action for reasons of merit. Mrs. Field cited three cases with interesting features:

1. One which showed a good use of progressive counseling and warning concerning the consequences of continued leave problems. The agency carefully documented its actions and was able to sustain a removal action after eight months with a small amount of disapproved leave when the leave problems did not abate. (BN075299029 9/24/79)

2. Another in which the agency based its action on approved leave without pay which met three criteria:
   a. The employee was prevented from reporting for duty by reasons beyond his or her control;
   b. The absences continued beyond a reasonable amount of time; and
   c. The employee was warned that adverse action might be initiated unless he or she became available on a regular full-time basis. (CH75209005, 10/10/79)

3. A third case where the agency had used a legal term in its charge, and was unable to provide the degree of proof necessary to sustain the legal charge, though it could have apparently sustained its action by using an administrative term rather than a legal one. (DE752090003, 10/10/79)

Mrs. Leh n noted there had been 34 decisions on actions taken under Part 752. Of those where the Board made substantive decisions, 24 were sustained, 3 reversed for harmful procedural error, and one on merits. The Board has just reopened on its own motion 14 of those decisions, and one decision under Part 752 which involves performance-based reasons.

Mrs. Lehman said she was aware of three purely "mixed" cases involving performance and conduct. Of those, one was taken under Part 432 and adjudicated under both Parts 432 and 752. The second was taken under Part 752 and upheld under that regulation; the third, taken under Part 752, was reversed because the employee didn't get the protections of Part 432. Ten actions were taken under Part 752 for purely performance-based reasons. Of these, half were sustained, half reversed for harmful procedural error. In those which were sustained, the appellant did not raise the issue of harmful error. Mrs. Lehman notes some confusion as what is conduct and what is performance -- a gray area needing clarification.

Mrs. Lehman next mentioned that there were complaints to the Special Counsel about reassignments in four agencies. Also, one withholding of a within-grade increase was stayed by the Special Counsel because the employee was not given the critical elements and performance standards of his position.

Issues involved when recognized mental handicap is alleged to be a basis for an employee's misconduct

Mr. Mihelcic of the Office of the Chief Counsel, IRS, discussed a recent decision by the Merit Systems Protection Board, which Mr. Mihelcic believes may be the most significant case, because of the various issues raised, to come out of MSPB. The agency's decision to remove an employee with less than five years' service for repeated misconduct was reversed on a finding of discrimination based on mental handicap in that the employee suffered from a mental condition; the agency had substantial reason to know of this condition, and thus had an obligation to direct a fitness-for-duty examination to determine whether or not she was a qualified handicapped person. Failure to refer the individual constituted prohibited discrimination.

Mr. Mihelcic believes this requirement set by the presiding officer goes beyond any set by Supplement 339-1, in which

ting them are discussed, and is contrary to precedent. Agencies will be reluctant to take actions based on misconduct without a fitness-for-duty examination where there is any possibility of a later allegation of mental handicap discrimination. In addition, the decision may lead to actual discrimination against hiring the mentally handicapped because of a perception that such individuals cannot be held to the same standards of conduct and responsibility as other employees. This is unfair to the mentally handicapped who can and are doing the work of a position.

Mr. Mihelcic and members discussed other implications of this decision particularly with regard to the hearings held by Mrs. Spellman last year in the House of Representatives. These resulted in a report finding (1) a lack of statutory authority for involuntary fitness-for-duty examinations other than those preceding disability retirement, and (2) that involuntary fitness-for-duty examinations were often used for harassment.

Thus, the MSPB decision opens a clear potential for abuse. Some members indicated their agencies might file amicus briefs or, if a hearing is scheduled, make oral arguments in this case. Elise Smith of OPM's Office of the General Counsel, who is preparing OPM's brief on the case, asked members to call her with similar issues.

Attorney fee awards

We are aware that attorney fees have been awarded in three instances so far. The agencies involved have requested reopening in each; and OPM has intervened, or will intervene. Steve Moe (U.S. Postal Service) and Dick Alpher (Justice Department) briefly discussed their positions on attorney fee decisions. In both cases, the agency thinks that the award of attorney fees was inappropriate since the agency action was not clearly without merit and was not a prohibited personnel practice. They strongly believe that the award of attorney's fees should not be, nor was it intended by Congress to be made on a routine basis, whenever an agency action was reversed, but only when it was in the interest of justice. Another member pointed out that his agency was not given the opportunity to object to the validity and the reasonableness of the fees awarded as it should have been because the official MSPB "service award" was never made.

Consideration of the past disciplinary record in MSPB appellate reviews

Conrad Pearson (Navy Department) noted that an MSPB decision had been reopened in a case where the agency had considered the past disciplinary record to determine the severity of the penalty it would impose. The issues presented by the Board were: When the appellant challenges the past disciplinary record, does the agency have to prove the reasonableness of its past record, and (2) if so, what degree of proof is necessary? This reopening seems to point to an MSPB litigation of the past record, in fact to a change in standards for the use of the past record. Members agreed that the Board should follow the criteria set forth in the former Supplement 752-1, which the Board has hitherto followed.

Other concerns with trends apparently being set by decisions

-- Members are concerned that the Board is reopening decisions on its own motion after the date for the initial decision to become final. This could prove costly to the government.

-- Committee members are not sure why the Board has reopened some of these decisions, other than to establish or reaffirm a particular policy.

Suggested clearinghouse for handling significant issues in reopened cases

Those present discussed Conrad's suggestion that some form of clearinghouse be set up by members to get word to other members when significant issues are a basis for a reopening request, so that those who wished to file briefs or make oral arguments would be able to do so. Agencies could then work together on the issues of Government-wide concern. Mrs. Lehman said OPM would be glad to participate by notifying members of such cases.

Finally, Mrs. Lehman noted that she has been told that MSPB will be publishing case decisions.